IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 20TH DECEMBER 2006 / 29TH AGRAHAYANA 1928

Co. Appeal.No. 1 of 2006()

AGAINST THE JUDGEMENT IN CP.13/2005 Dated 23/08/2005
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APPELLANT/RESPONDENT NO.8:

UCO BANK UCO BANK,
13/22, K.G. ROAD, BANGALORE-560 009.

BY ADV. SRI.GEORGE KARITHANAM VARGHESE
SRI.V.J.JOHN
SRI.C.I.ABRAHAM
SRI.JOSE KURIAKOSE (VILANGATTIL)

RESPONDENTS: PETITIONER COMPANY, RESPONDENTS 1 TO 7 & 9 TO 21:
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1. BPL LIMITED HAVING ITS
REGISTERED OFFICE AT BPL WORKS
PALAKKAD-678 707, KERALA.

2. BNP PARIBAS, `LANDMARK',
3RD FLOOR, 21-15, M.G. ROAD,
BANGALORE-560 001.

3. INDUSIND BANK LTD., REGD.OFFICE
GEN THIMMAYA ROAD, PUNE-400 001.

4. THE BANK OF RAJASTHAN LTD.,
REGD.OFFICE AT CLOCK TOWER, UDAIPUR
RAJASTHAN AND CENTRAL OFFICE AT C-3 SP MARG,
C. SCHEME, JAIPUR.

5. U.T.I. BANK LTD.,
CENTRAL OFFICE AT MAKER TOWER,
13TH FLOOR, CUFFE PARALE, COLABA,
MUMBAI-400 005.

6. KARNATAKA STATE INDUSTRIAL DEVELOPMENT
CORPORATION LTD., MSIL HOUSE,
36, CUNNINGHAM ROAD, BANGALORE-560 052.

7. ING BANK N.V.604, EMBASSERY CENTRE,
NEXT TO STATUE RESTARURANT,
NARIMAN POINT, MUMBAI.

8. ING BANK N.V., 7TH FLOOR,
HOECHST HOUSE, 193 NARIMAN POINT,
MUMBAI-400 021.

9. THE HONGKONG AND SHANGHAI BANKING
CORPORATION, P.B.NO.5267,
NO.7, M.G. ROAD, BANGALORE-560 001.

10. INFRASTRUCTURE LEASING & FINANCIAL
SERVICE LIMITED, `WESCARE TOWERS'
3RD FLOOR, 16 CENOTAPH ROAD,
TAYNAMPET, CHENNAI-600 018.

11. ABU DHABI COMMERCIAL BANK,
CITI CENTRE, NO.28 CHURCH STREET,
BANGALORE-560 001.

12. BANK OF INDIA, STAR HOUSE,
C 5 G BLOCK, BANDRA KURLA COMPLEX
BANDRA EAST, MUMBAI-400 051.

13. JAMMU AND KASHMIR BANK LTD.,
CENTRAL TREASURY AND INVESTMENT DEPARTMENT
CORPORATE OFFICE, M.A. ROAD, SRINAGAR.

14. LIFE INSURANCE CORPORATINO OF INDIA
CENTRAL OFFICE AT YOGAKSHEMA,
JEEVN BHIMA MARG, NARIMAN POINT,
MUMBAI-400 021.

15. ICICI BANK LTD., LAND MARK,
RACE COURCE CIRCLE, VADODARA-390 215.

16. ASSET RECONSTRUCTION COMPANY (INDIA) LTD
REGD.OFFICE, 17TH FLOOR, EXPRESS TOWERS,
NARIMAN POINT, MUMBAI-400 021.

17. CENTURIAN BANK LTD.,
CHOICE TOWERS, MANORAMAN JUNCTION,
KOCHI-16.

18. CANARA BANK, CONTONMENT BRANCH,
BANGALORE.

19. A.B.N. AMBRO BANK.

20. REGISTRAR OF COMPANIES OF KERALA,

21. CENTRAL GOVERNMENT.

R1 BY ADV. SRI. P.K. KURIAN (SENIOR ADVOCATE)
SRI. ANTONY DOMINIC
R4 BY ADV. SRI PARAS JAIN
SRI.N.BALAKRISHNA PILLAI
SRI.M.PATHROSE MATTHAI (SR.)
SRI.SANTHOSH MATHAI
SRI.C.G.SUNIL
SRI.SATHEESH MORTHI
SRI.B.G.BASHEER
SRI.M.P.R.NAIR
SRI.S.SAJU
SRI.LAL GEORGE
SRI.V.GIRI
SRI.V.M.KURIAN
SRI.JOSEPH KODIANTHARA
SRI.JOHN VARGHESE
SRI.E.K.NANDAKUMAR
SRI.JOHN VARGHESE, ASSISTANT SG
SRI.K.K.CHANDRAN PILLAI
SMT.M.E.NUSFA
SRI.K.M.FIROZ

THIS COMPANY APPEAL HAVING BEEN FINALLY HEARD ON 19/10/2006, ALONG WITH COA NO. 22 OF 2005 COA NO. 24 OF 2005 COA NO. 11 OF 2006 CROSS OBJECTION NO. 126 OF 2005 THE COURT ON 20/12/2006 DELIVERED THE FOLLOWING:

K.S.RADHAKRISHNAN & K. PADMANABHAN NAIR, JJ.

Company Appeal Nos. 1 of 2006, 22 of 2005, 24 of 2005, 11 of 2006 and Cross Objection 126/05 in COA. 22/2005.

Dated: 20th December 2006

JUDGMENT

Radhakrishnan, J.

C.P. No 13 of 2005 was an application preferred by BPL Limited under Sections 391 to 394 of the Companies Act seeking an order of confirmation of sanction for the Scheme of Arrangement as amended by amendments approved at the meeting of the secured creditors of the Company so as to be binding with effect from 31st March 2003 on the petitioner Company and all of its secured creditors and preference shareholders and also for other attendant reliefs, orders and directions. Learned Company Judge by order dated 23rd August 2005 accorded sanction for the Scheme and gave

the following directions.

i) The scheme of arrangement as amended by amendments approved at the meeting of the secured creditors on April 16,2005 being Annexure-D1 to the Company Petition No 13/2004 is sanctioned so as to be binding with effect from 31.3.2003 on the petitioner company and all of its secured creditors and preference shareholders, including any secured creditor and preference shareholder that may have obtained any decree, order or direction from any court, tribunal or any other authority, without any further act or deed by the petitioner company, in respect of the outstanding debt of the petitioner company as of March 31, 2003 to all its secured creditors and preference shareholders, which amount shall be as has been determined on the basis of the figures agreed and accepted between the petitioner Company and each of the secured creditors at the meeting of the secured creditors convened and held on April 16, 2005 and hence the figure as was specified in the application filed by the petitioner Company under Section 391(1) of the Companies act stands modified accordingly.

ii) The petitioner company shall within 30 days after the date of sealing of this order cause a certified copy thereof to be delivered tot he Registrar of Companies, Kerala for registration.

iii) On the coming into effect by the scheme of Arrangement being filed by the petitioner Company with the Registrar of Companies, Kerala and with effect from 31.3.2003, the outstanding debt of the petitioner Company owed to all secured creditors and Preference Shareholders as of 31.3.2003 shall be restructured on the terms and conditions and in the manner provided for in the Scheme of Arrangement as annexed in Annexure D1 to the petition.

iv) The total outstanding debt of the petitioner Company to all its secured creditors and Preference Shareholders as of 31.3.2003 of the petitioner Company shall be restructured under the Scheme of Arrangement and all the rights and liabilities relating to such outstanding debt to secured creditors and Preference Shareholders as of 31.3.2003 shall stand created under the Scheme of Arrangement. In addition, the petitioner Company and the Secured Creditors and Preference Shareholders shall enter into any documentation that may be required, only to give formal effect to the restructuring and for the modification of the security contemplated by the Scheme of Arrangement, and to govern the prospective/ongoing relationship between the petitioner Company and its Secured Creditors and Preference Shareholders (including covenants of the petitioner Company, supervision of the management of the petitioner Company, Event of Default etc.). However, upon the Scheme of arrangement coming into effect, in the absence of the formal documentation referred to above, the rights, obligations and privileges of the petitioner Company and the Secured Creditors and Preference Shareholders shall be governed by the provisions of the Scheme of Arrangement as detailed in Annexure D1 to the petition.

v) Any legal or other proceedings pending against the petitioner Company, in India or abroad, relating to any of the outstanding debt of the petitioner Company to Secured Creditors and Preference Shareholders shall, on the effectiveness of the Scheme of Arrangement, be terminated and the rights, obligations and liabilities of the parties shall be governed by the terms of the Scheme of Arrangement.

Four secured creditors, viz., Bank of Rajasthan Limited, Indusind Bank Limited, UCO Bank and Karnataka State Industrial Development Corporation Limited have preferred Company Appeals Nos. 22/05, 24/05, 1/06 and 11/2006 respectively under Section 391 (7) of the Companies Act, 1956 read with Section 5 of the Kerala High Court Act, 1958. Cross objection No 126/2005 was preferred by BPL Limited, the first respondent in Company Appeal No 22 of 2005. Bank of Rajasthan had not filed any objection before the Company Judge in granting approval to the Scheme of Arrangement, but filed Company Appeal No. 22 of 2005 supporting the contentions raised by Indusind Bank in CO.A. No 24 of 2005.

2. British Physical Laboratories India Private Limited, in short BPL, was incorporated under the Companies Act on 16.4.1963. Later the company became a public limited company. Fresh Certificate of Incorporation shows that the authorised share capital of the company was Rs 40,00,00,000/- comprising of 4 lakhs equity shares of Rs 100/- each, and issued, subscribed and paid up share capital of Rs 27,68,99,000/- of the equity shares of Rs 10/- each and redeemable preference shares of Rs 28,34,00,000/-. The company had diversified its business in consumer electronics, colour

television receivers, black and white television receivers, video cassette recorders etc. besides investments in facilities for dry cells, refrigerators and electronic components. Shares of the petitioner company were listed on several Stock Exchanges. The company had however faced with cash flow constraints for many years which had adversely affected the company's operations drying up the sales channel and resultant decline in sales leading to loss of Rs 287.8 crores for 18 months period ended on 30.09.2003 and taking the debt of the company to Rs 1494.57 crores as on 31.3.2003. The company however wanted to rejuvenate its CTV operations and regain its leadership position in the CTV industry especially when multinational brands entering the Indian market. The company therefore initiated a comprehensive restructuring of its primary operations involving rejuvenating its main CTV business through a joint venture with Sanyo, and proposed financial restructuring of the debt. The company had entered into a shareholder agreement with Sanyo Electric Co. Ltd. Japan. The company in terms of the agreement had to transfer its existing CTV business undertaking to the joint venture company constituting the BPL brand for CTV business, manufacturing, sales, service, marketing and distribution

infrastructure. Both BPL and Sanyo are having equal equity partners in the ratio of 50:50 in the joint venture and the CTV business is valued at USD 80 million (approximately Rs 368 crores at current exchange rates). The company had to invest USD 10 million (approximately Rs 46 crores at current exchange rate) in the JTV company and to receive a net cash inflow of USD 70 million (approximately Rs 322 crores at current exchange rate) which will be used to meet the commitments towards its creditors. Scheme was accordingly approved by the Board of Directors of the Company and the directors in their meeting held on 20th September 2004.

3. The Reserve Bank of India framed a Corporate Debt Restructuring Scheme dated 23.8.2001 as amended by notification dated 5.2.2004 for the purpose of considering the relief in respect of the liabilities of the companies piloted by a financial institution. Several meetings were therefore held by this company for restructuring it, the last of which was held Mumbai on 8.10.2004 when more than 79% of the CDR lenders in terms of the exposure agreed for restructuring of the debts of the company and transfer of the CTV business to the proposed BPL-Sanyo joint venture company. In order to bind the secured creditors and preference

shareholders including the non CDR lenders the company proposed to implement the restructuring through a Scheme of Arrangement between the company and its secured creditors and preference shareholders and therefore M.C.A. No 84 of 2004 was filed for holding a meeting for the purpose of consideration of the Scheme of Compromise/Arrangement made between the company and its creditors. The Company had also sought for stay of all proceedings pending before this court in C.P. Nos. 45 and 59 of 2003 , proceedings before the DRT, Bangalore, C.C. Nos 26057 to 26060 of 2003 before the Additional Chief Magistrate Court, Bangalore, New Delhi and also the proceedings initiated under the Securitisation Act against the Company.

4. Application was opposed by various financial institutions including the Indusind Bank, Bank of Rajasthan, UTI Bank etc. Indusind Bank stated that it had filed O.A No 66/2003 before the DRT, Mumbai apart from C.C.7102/2002 before the 10th Metropolitan Magistrate Court, Andheri under Section 138 of the Negotiable Instruments Act and those proceedings are pending and that the provisions contained in the RDB Act have overriding effect . Contention was also raised that application under Section 391 (1) of

the Act is not maintainable in view of the various proceedings pending before the DRT, Criminal court as well as before this court. Bank of Rajasthan had also stated that the winding up proceedings C.P. Nos 15 and 45 of 2003 are pending before this court and O.A. No 255/2003 is pending before the DRT, Mumbai. The UTI Bank had also stated that it has filed O.A. 85/2004 before the DRT, Mumbai and also C.C. 1018 to 1021 and 1032 of 2003 before the Metropolitan Court,New Delhi under Section 138 of the Negotiable Instruments Act. Learned Company Judge repelled all those contentions and took the view that in the absence of any express provision ousting the jurisdiction of the Company Court to consider such an application filed under Section 391 (1) of the Companies Act, that the application is maintainable. In support of this learned judge placed reliance on the decision of this court in M.F.A.No 1068 of 2000. Learned Company Judge also held as follows:

> "The line of decisions noticed above clearly show that while considering an application under Section 391(1) of the Companies Act for convening a meeting is pending, though this court by virtue of the powers conferred under Section 396 (1) of the Companies Act may stay any suit or proceedings against the Company on such term, as the court may think fit until the application is finally disposed of, or the expression "suit or proceedings" does not take in a criminal proceedings initiated under Section 138 of the Negotiable Instruments Act nor can the

> proceeding pending before the Special Tribunal, namely, the DRT or Securitisation Act could be stayed in exercise of such powers. As respect the proceedings of the DRT is concerned, it is governed by a special statute having exclusive jurisdiction on a matter pending before it, which stands outside the ambit of the term "proceedings" under Section 391(6) of the Companies Act. As held by the apex court this court will not have any jurisdiction to stay such proceedings pending before the Special Tribunal. Hence, the application seeking stay of the proceedings pending before the criminal court filed under Section 138 of the Negotiable Instruments Act and also against the proceedings initiated before the DRT and Securitisation Act cannot be stayed in exercise of the powers under Section 391 (6) of the Companies Act."

The learned Company Judge also took the view that the appropriate stage to consider the contentions of the nature canvassed by the various financial Institutions is when the matter comes up for consideration under Section 391 (2) of the Act. Learned Company Judge therefore allowed M.C.A. 84/2004 and ordered to convene a meeting of the secured creditors for the purpose of considering and if thought fit approving with or without modification of the compromise/arrangement proposed. Justice T.V. Ramakrishnan, a retired judge of this court, was appointed as the Chairman for the meeting. Learned Company Judge gave a direction that the value of each member/creditor should be in accordance with the books of the company and in case of dispute, the Chairman should determine the value. The meeting was ordered to be convened on 16.04.2005.

5. Indusind Bank Limited, Bank of Rajasthan Limited and UTI Bank Limited had however filed Company Appeals Nos. 2/2005, 4/2005 and 3/2005 respectively before the Division Bench against the order in MCA No 84 of 2004. Various contentions were raised before the Division Bench pointing out the effect of the DRT Act on Section 391 (1) of the Companies Act. Placing reliance on the decision in Allahabad Bank v. Canara Bank and another (101 Company Cases 64), Rainbow Denim Ltd v. Rama Petrochemicals Ltd (116 Company Cases 640) and Sakamari Steel v. Alloy Steel Ltd (51 Company Cases 256) those Banks had attacked the finding of the Company Judge that they legally bound by the terms of the "Inter-Creditor Agreement". The Division Bench, however, held as follows:

> "Thus, if there is nothing in the Act which precludes a creditor who has approached the Tribunal by agreement to satisfy with a lesser amount, we fail to see how it is open to the appellants to pursue with the opposition to the Scheme on the basis that the provisions of sub-section (2) of Section 391 of the Companies Act being opposed to the special provisions of the Debt Recovery Act, the Company Judge should not have ordered the convening of the meeting under Section 391 (1). We may note that the Apex Court has in a recent decision in Andhra Bank v. Official Liquidator and another (2005 CLC 531), partly overruled the dictum as laid down in the Allahabad Bank's case. The appellants do not

> have a case that the Inter Creditor Agreement is void or unenforceable on any ground whatsoever. In such circumstances, we find that the contention raised by the appellants based on the provisions of the Debt Recovery Act as interpreted by the Supreme Court in the Allahabad Bank's case supra, cannot be accepted. In this view of the matter, we feel that the appeals must fail and they are hence dismissed."

The Bank of Rajasthan then filed S.L.P (Civil) 14575 of 2005 before the Apex Court against the judgment of the Division Bench and the S.

6. Justice T.V. Ramakrishnan, Chairman of the meeting meeting had convened the meeting of the secured creditors on 16.04.2005. Meeting was attended either in person or by proxy by 32 secured creditors of the Company who were the holders of 1446.82 crores of the total outstanding debt of the company. Secured creditors like Karnataka State Industrial Investment & Development Corporation (appellant in COA 11/2006), Infra Structural Leasing & Financial Services Limited, Jammu and Kashmir Bank etc. did not participate in the proceedings. After the issuance of notice convening the meeting by the Chairman, the Company had forwarded a notice to the Chairman proposing three amendments to

the scheme. The Chairman then directed the Company to circulate those amendments to all the secured creditors individually. The same was done. For the purpose of deciding the total number and value of votes possessed by each secured creditors, the company had placed a list of creditors indicating the total debt due to each of them as on 31.3.2003. The amount of debt shown in the above list as due to each creditor was informed to each participant. No representatives or proxies, had raised any dispute regarding the quantum of debt shown in the list in the meeting. Amendment sought for was opposed by a few representatives. Consequently poll was conducted. Total number of persons voted was 32, out of which 24 secured creditors having votes of the value of Rs 1290,57,86,510/- voted in favour of the resolution for amendments. Thus the number of creditors voted in favour of the three amendment resolutions amounted to 75% of the creditors present and voting in the meeting and 89.20% of the value of total votes polled. Thus all the three amendments were declared as approved. Later the original scheme as amended by the amendments approved by the meeting was placed before the Chairman. Twenty four secured creditors having a value of Rs 1290,57,86,510/- had voted in favour

of the resolution and it satisfied the majority required for approval of the resolution as per Section 391 (2) of the Companies Act. Chairman therefore prepared a report to that effect on 20.04.2005. The Company therefore preferred C.P. No 13 of 2005 before the Company Judge to approve the Scheme of Arrangement as amended by the amendments approved at the meeting of the secured creditors on 16.04.2005 under Section 391 (2) of the Companies Act and prayed for the following reliefs.

> a) That the scheme of Arrangement as amended by amendments approved at the meeting of the Secured Creditors on April 16, 2005 being Annexure D-I to the petition, be sanctioned by this Honourable Court so as to be binding with effect from March 31,2003 on the petitioner Company and all of its secured creditors and preference shareholders, including any secured creditor and preference shareholder that may have obtained any decree, order or direction from any court, tribunal or any other authority, without any further act or deed by the petitioner company, in respect of the outstanding debt of the petitioner company as of March 31, 2003 to all its secured creditors and preference shareholders, which amount shall be as has been determined on the basis of the figures agreed and accepted between the petitioner company and each of the secured creditors at the meeting of the secured creditors convened and held on April 16, 2005 and hence the figure as was specified in the application filed by the petitioner company under Section 391(1) of the Act stands modified accordingly.

b) That this Hon'ble Court hold that upon the scheme being sanctioned by this Hon'ble Court and coming into effect by the same being filed by the petitioner company with the Registrar of Companies, Kerala and with effect from March 31, 2003, the outstanding debt of the petitioner Company owned to all secured creditors and preference shareholders as of March 31, 2003 shall be restructured on the terms and conditions and in the manner provided for in Scheme of Arrangement as annexed in Annexure D1.

c) That this Hon'ble Court hold that the total outstanding debt of the petitioner company to all its secured creditors and preference shareholders as of March 31, 2003 of the petitioner company shall have been restructured under the Scheme of Arrangement and all rights and liabilities relating to such outstanding debt to secured creditors and preference shareholders as of March 31, 2003 are created under the Scheme of Arrangement, that in addition, the petitioner Company and the Secured Creditors and Preference Shareholders shall enter into any documentation that may be required, only to give formal effect to the restructuring and for the modification of the security contemplated by the Scheme of Arrangement, and to govern the prospective/ongoing relationship between the petitioner Company and its secured creditors and Preference Shareholders (including covenants of the petitioner Company, supervision of the management of the petitioner Company, events of default etc.) and and that, however, upon the Scheme of Arrangement coming into effect, in the absence of the formal documentation referred to above, the rights, obligations and privileges of the petitioner company and the secured creditors and preference shareholders shall be governed by the provisions of the Scheme of Arrangement as detailed in Annexure D1.

d) That this Hon'ble Court hold that any legal

or other proceeding pending against the petitioner company in India or abroad, relating to any of the outstanding debt of the petitioner company to secured creditors and Prefrence Shareholders shall, on the effectiveness of the Scheme of Arrangement, be terminated and the rights, obligations and liabilities of the parties shall be governed by the terms of Scheme of Arrangement.

e) That this Hon'ble Court hold that the petitioner Company shall within 30 days after the date of sealing of the order to be made herein or within such other time as may be permitted by the Hon'ble Court cause a certified copy thereof to be delivered to the Registrar of Companies, Kerala for registration.

f) That such further or others order/orders be made and/or directions be given as this Hon'ble Court may deem fit and proper.

Learned Company Judge in paragraph 4 of the judgment has minuted thus:

"On the basis of the materials on record, including those placed after the commencement of the proceedings in the company petition and on the basis of the submissions of the counsel, it is noticed that around 99% of the secured creditors, going by the credits, have supported the Scheme as of now. Those who supported at the meeting of the secured creditors on 16.4.2005 included nationalised banks and various other institutions, including public sector bodies. After certain objections were filed to the Scheme, during the pendency of this Company Petition, many of them have been withdrawn. The Canara Bank and the Centurion Bank have also placed statements supporting the

scheme. “

Going by what is minuted by the Company Judge in the judgment, objection was raised, only by Indusind Bank Limited at the time of arguments before the learned single judge. No objection was raised by the Bank of Rajasthan in accepting the Scheme of arrangement. The learned Judge held that it was beyond dispute that all the requisite statutory procedure for supporting such a Scheme had been complied with in this case and that the requisite meetings as contemplated under Section 391 (1)(a) were held and there was also no dispute that the scheme put for sanction of the court was backed by the requisite majority vote as required by sub-section (2) of Section 391. Learned Company Judge held the Company was acting bonafide and in good faith in order to promote the best possible interest of the secured creditors and that there was no element of coercing the minority. Company Judge therefore took the view that the scheme as a whole, is just, fair and reasonable from the point of secured creditors, and also for the best interest of the company.

7. Learned Company Judge also dealt with the objections

raised by Indusind Bank Limited. Contention was raised by Indusind Bank Limited that the scheme, if sanctioned, would impinge on the right of the Bank to prosecute proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Further it was also contended that the scheme sanctioned would impair the right to continue prosecution under Chapter XVII of the Negotiable Instruments Act. Contention was also raised that the proceedings under the DRT Act and Section 138 of the Negotiable Instruments Act if allowed to start would be opposed to public policy. Learned Company Judge repelled all those contentions and held that parties are bound by the judgment in M.C.A. 84/2004 which was later affirmed by the Division Bench and the S.L.P filed against which was also withdrawn. Learned judge took the view that the contentions raised were considered in those proceedings and were negatived. Learned judge took the view that the RDB Act has no overriding effect on the provisions of Chapter V of Part VI of the Companies Act. Learned judge also repelled the contentions that the arrangement, if sanctioned, would result in depriving the objector of its rights to prosecute the complaints under Section 138 of the Negotiable Instruments Act. The court held that the provisions in

Chapter XVII of the Negotiable Instruments Act are never treated as modes of recovery and there is no repugnancy conceivable between the provisions of Chapter XVII of the Negotiable Instruments Act and the provisions of the Companies Act. Learned judge also held that all the required statutory procedure for supporting the Scheme has been complied with and the required meeting as per Section 391(1)(a) was held and the Scheme put up for sanction was backed by the requisite majority vote as required under sub-section (2) of Section 391. The court also took the view that the class of secured creditors were acting bonafide and in good faith in order to promote the best possible interest of the secured creditors and there is no element of coercing the majority. Learned judge therefore repelled all the contentions raised against the approval of the scheme and allowed the application granting approval to the scheme with certain directions, vide judgment dated 23.08.2005. Aggrieved by the judgment these appeals have been preferred.

8. We heard Sri Paras Jain Kuhad on behalf of Bank of Rajasthan, Smt Vandana Jaisingh for Indusind Bank, Sri George K. Varghese for UCO Bank, Sri K.K. Chandran Pillai for Karnataka State Industrial Investment Development Corporation Limited and Senior

Counsel Sri P.K.Kurien for the respondent company.

9. Sri Paras Jain appearing for the Bank of Rajasthan led the arguments on behalf of the appellants. Learned counsel had placed reliance on the grounds raised by the Indusind Bank, since Bank of Rajasthan did not file any objection before the Company Judge while dealing with the application under Section 391 of the Act. Apart from the grounds urged in the appeal memoranda counsel filed written submission dated 9.10.2006 and 7.11.2006. Counsel submitted though the Bank had raised no objection to the Scheme while dealing with the application under Section 391 (2) the court has got a duty to examine whether the Scheme of arrangement is fair and equitable. Counsel submitted that the clear financial position of the company was not disclosed at the meeting held on 16.04.2005. It is pointed out that the balance sheet as on 30th September 2003 alone was made available and the balance sheet as on .31.03.3002 was not made available. Counsel pointed out that the cut off date of the proposed Scheme of Arrangement was 31.03.2003, but the accounts were not closed on that day. Accounting year had ended on 30.09.2003 and this was shown for the specific purpose of concealment of material facts. Counsel also submitted that the

Company has manipulated the entries in the balance-sheets for the year 30th September 2003 and in order to establish those facts a chart was prepared and submitted to show that there is marked difference between the entries pertaining to the financial year 2001-2002 and the annual report of 2002-2003. Placing reliance on the chart submitted along with the written submissions counsel submitted that the scrutiny of figures relating to loans from Banks and term loans from Financial Institutions set out at items 1 and 2 of the Comparative Chart clearly expose that the company's game plan was to favour financial institutions who were colluding with them for securing sanction of the scheme at the cost of the Banks. It was also stated that the figures relating to the term loans from financial institutions were manipulated in annual report 2002-03 so as to reduce the financial institution exposure from 253 crores (in the annual report 2001-02) to a sum of Rs 80 crores only correspondingly the Bank's exposure which was only Rs 200 crores artificially hiked upto Rs 564 crores. In item 4 of the comparative statement the amount originally shown as receivables from sundry debtors as Rs 348 crores was suddenly reduced to Rs 190 crores. The reduction in the level of amount of receivables from sundry

debtors, according to the counsel, clearly brings out that during the interregnum of issuing the next annual report a sum of (Rs 348 crores - 190 crores)i.e. 158 crores stood collected and thus the sundry debtors outstanding stood reduced. Referring to item 5 of the comparative statement, amount representing advances recoverable, it is stated that it has been reduced from Rs 847 crores to Rs 673 crores and this reduction is also attributable to the differential amount of Rs 177 crores having stood collected in the meanwhile. Further it is also pointed out that the figures relating to sundry debtors and advances recoverable clearly demonstrate that subsequent to the publication of the annual report for the year 2001-02 in accordance with the statutory provisions, viz. Sections 210 and 233 of the Companies Act 1956, the company was attempting to defraud the commercial banks by introducing recast figures in respect of different categories of assets and liabilities.

10. Counsel submitted that the balance sheets being statutory documents once they are statutorily finalised, figures therein cannot be changed. Counsel further submitted that introduction of tutored set of figures in the annual report 2002-2003 in respect of financial year 2001-2002 is enough to vitiate the balance sheet for the year

2002-2003. The sanctity and reliability of annual report 2002-2003 undermined by virtue of insertion of tutored figures. Counsel therefore submitted that no reliance could be placed on those balance sheets. Further it is also stated that there has been siphoning of funds which can be deduced from the balance sheets for the year ending 31st March 2002. Counsel submitted that siphoning was done in the guise of payment to unsecured creditors. Reference was made to the status of unsecured creditors for the year 2001 which shows the figure of Rs 234,73,56,863/- and the unsecured loan of Rs 84,34,37,583/-. Further it is pointed out that there has been siphoning of funds from the company by way of investment activities in the year 2002 which would come to Rs 124 crores. Counsel further submitted that an amount of Rs 537 crore shown as repayment of long term borrowings and a sum of Rs 199 crores by way of financial charges. Counsel submitted that would defeat the interest of the secured creditors. It was pointed out that an amount of Rs 19,25,99,699/- was paid to sundry creditors and that total pay off to unsecured creditors, sundry creditors by way long term borrowings is upto 904 crores which shows massive siphoning of funds in the year ended on 31st March 2002. Counsel submitted

that payments could not have been made in the face of the huge amounts owed to secured creditors.

11. Counsel also pointed out that the Company had diverted funds amounting to Rs 67.16 crores and Rs 100.40 crores respectively to the group companies including its subsidiary companies like BPL Display Devices Limited, Bharat Energy Ventures Limited and BPL Soft Energy Systems Limited. It is also pointed out that siphoning of funds may also be noticed from the balance sheet for the year ended 30.09.2003. The above said pay outs amounts to Rs 554 crores, either by sundry creditors or by investments made, interest etc. Counsel submitted within the short span of 18 months ending on 30.09.2003 an amount of Rs 409 crores was siphoned out of the company in the guise of advances made to third parties. Counsel submitted that the total pay out in the year ended 30th September 2002 to sundry creditors, investment, interest and repayment of long term borrowings would come to Rs 554 crores and the pay outs by way of loans and advances in the year ended 30th September 2003 would come to Rs 409 crores and the total pay out would come to Rs 963 crores.

12. Counsel submitted that the above facts would indicate that

the company was always in a position to pay off the entire amount of dues to the lenders and the presentment of the Scheme seeking for a sacrifice on the part of the company to the tune of 72% cannot be sustained. The company has proposed to pay off 28% of the total debts of approximately Rs 1,500 crores which amounts to an amount of only Rs 420 crores. Counsel submitted that the above manipulations of entries in the balance sheets of the Company would violate the statutory provisions of the Companies Act. Section 211 (1) of the Companies Act states that every balance sheet of a company shall give a true and fair view of the state of affairs of the Company as at the end of the financial year. Section 211 (3A) of the Act states that every profit and loss account and the balance sheet of the company shall comply with the accounting standards. Counsel also placed reliance on the final written submission and submitted that the company was profit making company having its positive net work of Rs 476.77 crores. Further it is also pointed out that the total assets of the company is in excess of debt of Rs 1494.57 crores. Counsel submitted that the latest financial position of the company had never been projected before court as per the proviso to Section 392 of the Act and hence the court should not have accorded

sanction for the scheme of arrangement.

13. Smt Vandana Jaisingh, counsel appearing for Indusind Bank supported the arguments on the basis of the above facts and figures projected by the counsel appearing for Bank of Rajasthan Limited. Counsel submitted that the company was not a sick company warranting restructure. The total assets of the company was much in excess of the debt of Rs 1494.57 crores and there was no difficulty for the company to pay off the debts. Counsel submitted that the company had diverted Rs 100.40 crores to subsidiary companies. Counsel pointed out that a sum of Rs 641.66 crores of rupees as on 30.09.2003 was receivable towards loans and advances and that the amount was reflected in the scheme . Counsel submitted that the company was also prepared to make payment to certain secured creditors. Further counsel submitted that Indusind Bank had not signed the revised ICA agreement dated 5.3.2004 and therefore the said decision is not binding on the Indusind Bank. Counsel submitted that the order passed by the Company Court under Section 391 (2) would not override the order passed by the DRT, Mumbai in O.A. 66/2003. Counsel submitted by virtue of Sections 17 and 18 the powers of the DRT are having exclusive and

overriding effect. Counsel also submitted that the company court has no power or jurisdiction to nullify the proceeding under special statutory provision of sections 138 to 142 of the Negotiable Instruments Act.

14. Sri K.K. Chandran Pillai, counsel for the appellant in Co.A No 11/2006 submitted that an amount of Rs 4,31,47,988/- was due to the Corporation as on 31.03.2003 though according to the Company on payment of Rs 1,20, 81,437/- that has been in full and final settlement of its claims. Counsel submitted that the Corporation has got the power to take over the assets of the company invoking the powers under Section 29 of the State Financial Corporations Act.

15. Sri George K. Varghese, counsel appearing for the appellant in Co.Appeal 1/2006 submitted that the learned company judge has failed to note that the Bank had already invoked the provisions of the Securitisation Act and the company's property has already been mortgaged to the Bank. Counsel submitted that the scheme of arrangement would not override the provisions of the Securitisation Act or the DRT Act. Cross-objection No 126/05 has also been filed by the Infrastructure Leasing and Financial Services Limited supporting the appellants.

16. Sri P.K.Kurien, Senior Counsel, countered all the on facts and figures projected in the appeal memorandum as well as in the argument notes submitted by the counsel for the appellants. Detailed reply statement has also been filed on behalf of the company traversing the various factual details furnished by Bank of Rajastan Limited and Indusind Bank Limited. Senior Counsel reminded us that no argument was in fact advanced before the Company Judge based on those facts and figures. Counsel also submitted that Bank of Rajasthan had not filed any objection while dealing with application under Section 391(2) of the Act according sanction for the scheme of arrangement and the present appeal has been filed after obtaining leave. Counsel therefore submitted that the arguments raised by the counsel for the first time before the appellate court shall not be entertained. Company has however filed written submission on 07.10.2006 traversing the various contentions raised by Bank of Rajasthan and the company has also filed detailed reply on 11.10.2006 traversing the various contentions raised by Indusind Bank. Counsel referred to paragraph 6 of the written arguments submitted by the Bank of Rajasthan, dealing with various contentions raised by the secured creditors who had fully

accepted the order of the Company Judge confirming the scheme under Section 391 (2) except Indusind Bank and the appellant in C.O.A. No 11 of 2006. Referring to paragraph 7 of the argument notes, it was pointed out that in paragraph 4 of the written submission under the head “secured creditors”. In the schedule forming part of the accounts on 30.09.2003 page 363 of Vol. II under the head “secured loans” debentures at 31.03.2002 was shown as Rs 216,88,87,342. Complaint was that on the same date, in the accounts for the period ending 31.03.2002, commencing at page 88 at page 143 under sundry loans, the amount outstanding against debentures as at 31.03.2002 was shown as Rs 202,98,00,000/-. Counsel pointed out that in the next entry in the same page against interest on these debentures, which has been outstanding as on that date amounting to Rs 13,00,87,342/- was deliberately ignored by the appellants. Counsel submitted that if those figures are added together it would come to the same figure of Rs 216,88,87,342/-. Counsel therefore submitted there is no basis in the jugglery made by the counsel on those factual details.

17. Counsel also referred to various other contentions raised in pages 8 and 9 of the argument notes and the details given in the

comparative chart. Counsel submitted that all the items referred to in the chart except item 9 are covered by auditor's certificate. Reference was made to BPL's affidavit dated 24.01.2005 in Vol. C.P. 17 at page 25 para 6. Reference was also made to another affidavit dated 29.11.2004 of the BPL in Vol. C.P.2 at page 12 paragraphs 15 to 18. A chart prepared on the basis of audit certificate was annexed as Annexure I. Counsel submitted that all these are on account of the regrouping of the figures of relevant previous year and reclassifying them for presentation for the year ended on 30.09.2003 as stated by the auditors. Reference was also made to Note No 25 at page 372 of the Appeal Memorandum which reads as follows:

> "Accounts relate to 18 months period commencing from April 1,2002 to September 30,2003. The previous years' figures, which are for the period of 12 months ended March 31, 2002 are not strictly comparable. The previous years figures have been re-grouped and re-arranged wherever necessary to suit the current period's presentation."

Counsel also referred to paragraph 9 of the written submissions and countered the various allegations raised in paragraph 8 of the written

submissions submitted; by Bank of Rajasthan Limited. It was alleged that an amount of Rs 150 crores was sanctioned for payment to unsecured creditors. Counsel submitted that unsecured loans from from the Banks which were Rs 190 crores as on 31.03.2001 was reduced to Rs 76 crores by 31.03.2002. Referring to unsecured creditors it was stated that there was corresponding increase in the secured loans and that the unsecured loans were paid off. The unsecured loans were paid of were from Banks when advances were restructured. With regard to the allegation of siphoning of funds during the year 2002 of Rs 120 crores, it was stated that the above statement was taken from the consolidated cash flow statement which included cash flows of subsidiary companies. The statement has no relevancy since the parties are concerned only with BPL's cash flow statement for the year as seen from page 158. It was pointed out that the net cash used for investing activity was Rs 101 crores which included Rs 35.5 crores for purchase of fixed assets of the company and Rs 67 crores only towards investment. Further it was also submitted that the amount invested was in the subsidiaries of BPL, BPL Display Devices Limited and BPL Soft Energy Systems Limited which came to Rs 67 crores. This appears in the cash flow

statement in page 158 under the head “purchase of investment”. Referring to paragraph 8 C it was pointed out that figures were again taken from the Consolidated Cash Flow statement. It was stated that the amount shown as repayment of long term borrowings in BPL's cash flow statement was Rs 474 crores. As against this under the head proceeds from long term borrowings there was an item of 427 crores. It is pointed out that while sanctioning the new loan, institutions and banks sometime adopt a practice of insisting on repayment of existing loans. Further it was stated that as far as item 8 (d) is concerned, cash flow statement of BPL would show that in so far as paying off the sundry creditors was concerned, it was actually an inflow by way of increase and the inflow was to the extent of Rs 39.42 crores as against pay off of Rs 19.25 crores in consolidated cash flow statement. Again it was pointed out that the net cash used in financing activities is Rs 199 crores and the same is taken from the Consolidated Cash Flow statement whereas the corresponding figure in the company's cash flow statement was 108 crores of rupees. Referring to paragraph 8.3 it is stated that there was no mention of 427 crores as shown in page 128 of Vol. I. It was stated that the secured loans stood at Rs 518 crores as on

31.3.2001. Detailed annexure has been given in the argument notes and the averments contained in paragraphs 8.3 and 8.4 and hence require no further reiteration.

18. We are of the view that the Company has effectively countered the factual details furnished by the appellants. We have no reason to think that 99% of the secured creditors were unaware of the factual details furnished by the company and the appellants before us, when they discussed the matter at the meeting held on 16.04.2005. The Company Judge has noticed that 99% of the secured creditors had accepted the Scheme. The Bank of Rajasthan had not filed any objection; nor projected any of these details before the Company Judge. Consequently on the basis of the Scheme as approved by the Company Judge, joint venture project between BPL and .Sanyo has already come into existence and much progress has been made by the joint venture company making large investments. We therefore find no reason to upset the Scheme on the basis of the above factual details projected by the counsel for the appellants which were neither projected before the Company Judge or in the appeal memorandum before us, but only at the time of arguments.

19. We have gone through the appeal memorandam submitted by Bank of Rajasthan and noted the question of law raised. The first ground raised in the grounds of appeal is that the order dated 23.08.2005 of the Company Judge allowing C.P. No 13 of 2005 is erroneous and contrary to the law declared by the Supreme Court in Allahabad Bank v. Canara Bank (2000) 101 Company Cases 64 and is violative of the clear provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Counsel pointed out that RDB Act is a special statute creating special authorities and special procedure conferring exclusive powers and jurisdiction on those authorities under the Act for recovery of debts due to Banks and financial institutions and that the statutory right conferred under Section 391 (1) of the Companies Act to the majority of the creditors to agree with any scheme and make the same binding on the majority of creditors would be overridden by Section 34 of the RDB Act which is a latter special law. Reference was made to the decision of this court in ICICI v. Vanjinad Leathers Ltd (AIR 1997 Kerala 273). Grounds C and D also refer to the same points. Grounds I, J and K refer to some factual details which we have already dealt with in the earlier part of the judgment. Indusind Bank

has also taken a ground that the Company Court has no jurisdiction to nullify the proceedings pending before the DRT under the RDB Act and the criminal complaint initiated under Sections 138 to 142 of the Negotiable Instruments Act. Reference was made to the decision in State of Tamil Nadu v. Uma Investments Pvt.Ltd (1977) 47 Company Cases 242) . Reference was also made to the decision of the apex court in Rajneesh Aggarwal v. Amit J. Balla (2001 (1) SCC 631) Counsel also submitted that since BPL is declared as a sick company and assets are much in excess of the secured credit there is no necessity of restructuring the company. We may indicate all these legal points were considered while MCA 84/04 was disposed of. Though appeal was filed against the said judgment as C.A.2/05 and other connected appeals those were dismissed on 17.05.2005 and S.L.P filed before the Supreme Court was dismissed as withdrawn.

20. The scope of Section 391 has been elaborately considered by the apex court in Miheer H. Mafatlal v. Mafatlal Industries Ltd. (1996) 87 Company Cases 792) and held that a company court shall not act as a court of appeal and sit in judgment over; the informed view of the concerned parties to the compromise as the same would

be in the realm of corporate and commercial wisdom of the concerned parties. It was further held that the court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. The court held that the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The court cannot, therefore, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. It was held that the sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391 (1) (a) have been held; that the scheme put up for sanction of the court is backed up by the requisite majority vote as required by Section 391, sub-section (2); that the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question, that the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting

members of that class; that all necessary materials indicated by section 393 (1) (a) is placed before the voters at the concerned meetings as contemplated by section 391, sub-section (1) and that all the requisite materials contemplated by the proviso to sub-section (2) of section 391 of the Act are placed before the court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same and that the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy.

21. We have on facts found that except the Indusind Bank, others have supported the scheme and that Bank of Rajasthan did not file any objection before the Company Judge and the facts which the counsel has tried to place before us were neither placed before the Company Judge nor in the meeting held on 16.04.2005. Contention was raised that the Company had not placed the entire materials before the company Judge including the latest financial position of the Company. Proviso to Section 391 (2) is a mandatory provision making it mandatory to disclose all the material facts and the latest financial position of the company including pendency of any investigation proceedings as on the date of the petition to enable

the court to exercise its jurisdiction under Section 391. Reference was made to the decisions of the Gujarat High Court in In re Maneckchowk and Ahmedabad Mfg. Company Ltd. (40 Company Cases 819) and Navjivan Mills Ltd. In Re (1972) 42 Company Cases 265). Latest financial position of the Company means position at the time of filing of the petition. Materials showing the latest financial position would normally be filed when the application is filed for sanctioning the scheme. But in a given case the Company Judge can always call for further details to examine the latest financial position of the company especially when there is delayed disposal of the petition. So far as this case is concerned, we have the latest financial position of the company. Contention was raised before this court that profit and loss accounts were not made available to the Company Judge. But we notice that the latest balance sheet and auditor's report were made available to the Company Judge. Subsequent annual report and balance sheet though not produced would indicate that the Company was running at a loss and therefore the production of that balance sheet would only advance the contention of the company. Even if the latest quarterly or half yearly audit reports were made available to the

Company Judge, those documents would have shown that the company was running at a loss. We therefore find no reason to accept the contention that the latest financial position of the company was not disclosed before the company judge. We therefore find no error in the Company Judge granting approval to the scheme which was accepted by majority.

22. We may however point out that some of the directions given by the Company Judge with regard to the matters pending before the Debt Recovery Tribunal or the Company Court are not warranted, The Company Judge held that all legal or other proceedings pending against the petitioner Company in India or abroad relating to any of the outstanding debts of the petitioner Company to secured creditors and preference shareholders shall, on the effectiveness of the scheme of arrangement, be terminated and the rights, obligations and liabilities of the parties shall be governed by the terms of the scheme of arrangement. True, there is some reference in the Scheme of Arrangement with regard to pending matters. The Company Judge in exercise of the power under Section 392 approved the Scheme as such and the Scheme therefore would bind the Company's secured creditors, unsecured creditors and

others. We are of the view, the Company Judge is not justified in giving a positive direction that all legal matters pending In India or abroad would stand terminated. It is always open to the company and to the other secured creditors to proceed with the proceedings, if any, pending before the DRT, company court, criminal court etc. and those courts and authorities to examine the impact of the approved scheme of arrangement in those proceedings. Company Judge acting under Section 391(2) is not expected to decide the fate of those proceedings pending before the DRT, criminal and other courts and forums. In such circumstances, we dispose of all the appeals confirming the judgment of the learned Company Judge affirming the scheme of arrangement but the other directions given by the Company Judge with regard to matters pending before other forums would stand deleted. .

23. Appellant in C.O.A. No 1 of 2006 stated that they have invoked the provisions of the Securitisation Act and have taken vacant possession of 133.67 acres of land. Since the matter is pending consideration in appeal preferred by the appellant it is for that authority to pass appropriate orders in accordance with law taking note of the approved scheme of arrangement. In view of the

order passed in the appeals, no further orders are necessary in the Cross Objection filed in C.O.A. No 26 of 2006. The same would also stand disposed of as above.

SD/-

(K.S. RADHAKRISHNAN, JUDGE)

SD/-

(K. PADMANABHAN NAIR, JUDGE)

19/12/2006
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